SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Supreme Court, U.S.
FILED
JAN 26 1968
JOHN F. DAVIS, CLERK

No. 975

JAMES SEAGO,
Petitioner,

—against—

NORTH CAROLINA THEATRES, INC., et al.,
Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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January 25, 1968

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Opinions Below

The opinion of the Court of Appeals for the Fourth Circuit, in which it affirmed *per curiam* the decision of the District Court, is reported in F. 2d and is printed in the Appendix to this brief at pages 5a-6a. The opinion, findings, conclusions and judgment of the District Court have not been reported but are printed in the Appendix to this brief at pages 7a-33a. Pertinent provisions of the District Court's decision and opinion are, of course, referred to in this brief.

Jurisdiction

The decision affirming the judgment of the District Court, which petitioner seeks to have reviewed by this Court, was entered in the court below on September 25, 1967. The jurisdiction of this Court was invoked under Section 1254(1) of Title 28, United States Code. The jurisdiction of the District Court was invoked under Sections 4 and 16 of the Clayton Act, 38 Stat. 731, 737, Sections 15 and 26 of Title 15, United States Code. Defendants' motions for summary judgment were made under Rule 56 of the Federal Rules of Civil Procedure.

The Question Presented

Petitioner seeks a review and, of course, a reversal by this Court of the decision of the court below which affirmed the judgment of the District Court. In this ordinary action under the anti-trust laws, petitioner has sought to expand his claim out of all proportion to the issues which were before the courts below and which were decided against him. Petitioner makes the extraordinary claim that there were discriminatory practices against him; that there are conflicts among the Circuits and with decisions of this Court; that there were *per se* anti-trust violations; that there were divisions of the market; and that the courts below improperly used Rule 56 to impose unreasonable limitations upon enforcement of the anti-trust laws. Those claims are fictitious. None in fact existed. The questions presented by petitioner, as summariezd above, have no relation to the motions as they were decided by the District Court and affirmed by the court below.

The only question before this Court on this petition is whether there is anything about this case which warrants the attention of this Court. We submit that there is not. The Court below correctly affirmed the decision of the

District Court in entering judgment dismissing the complaint under Rule 56 of the Federal Rules of Civil Procedure because petitioner after complete pre-trial discovery could not demonstrate that he was entitled to subject the respondents to another full trial of his claims. In dismissing the complaint the District Court held (Appendix to this brief, page 31a):

> "Plaintiff has not offered any evidence of a common plan, scheme or design among the alleged conspirators. He has not offered any evidence which would allow him to prove conspiracy by similarity of conduct in that the record does not disclose evidence of a mutual awareness of action or conscious parallelism.
>
> "The plaintiff has presented a very forceful case in his complaint, but he has been unable to support his allegations by evidentiary facts as he must do to resist the motion for summary judgment. Plaintiff has used many of the stock phrases which have been identified with this type of action, but when the Court examines that part of his contentions which remain after disregarding that which is legally insufficient or mere surplusage, it becomes clear that his claim is without substance."

The Statutes Involved

Plaintiff alleged violations of Sections 1 and 2 of the Sherman Act, 26 Stat. 209, Sections 1 and 2 of Title 15, United States Code. The pertinent parts of those statutes are printed in the Appendix to this brief at page 1a.

The motions for summary judgment were made under Rule 56 of the Federal Rules of Civil Procedure. The text of Rule 56 is also included in the Appendix to this brief at pages 1a-4a.

Statement of the Case

Like all lawsuits, this one, commenced in 1961, must some day come to an end. That day is now. Petitioner, like many another owner of a failing or bankrupt business, has sought refuge in the courts to bail out an improvident investment. It is not the purpose or function of this or any other Court to rescue an investor from his own folly. Petitioner has advanced no reason why this Court should review the decision of the District Court as affirmed by the court below. No question is presented which has not been but should be decided by this Court.

This case relates solely to the operation of a small suburban theatre, the Colony, in Raleigh, North Carolina, and to nothing else. In Count 1 of his complaint petitioner set out numerous trade practices in the motion picture industry which he claimed were violations of the anti-trust laws on a nation-wide basis (Pltff's App. pp. 1-17).* in the court below, however, petitioner in his brief abandoned Count 1 of his complaint, declaring that his first count "is not of any great importance here" (Pltff's Brief, p. 3). We agree and thus look to the situation in Raleigh and to the competitive market in which petitioner operated the Colony theatre. Petitioner has advanced no new or compelling reason why the decision below is wrong. All the facts and petitioner's interpretataions of the facts were before the courts below. Indeed, petitioner here is merely repeating the interpretations of the record and the conclusions which he reached with respect to the relative value of certain motions pictures which he claims should have been licensed to him. Petitioner has ignored the fact that he

*It is not clear from the petition to which appendix in the court below petitioner from time to time refers. Petitioner's Appendix in the court below is referred to as "Pltff's App. p. " and respondents' appendix as "Defts' App. p. ".

could not conceivably have exhibited all of the pictures he claims should have been licensed to him. That matter is probably of no moment here. What is of moment here is that all of the arguments now advanced were before the courts below and were decided by them.

When petitioner acquired the Colony it was a 600 seat subsequent run theatre located in a small neighborhood shopping center in Raleigh. Petitioner purchased the theatre from the defendant Consolidated Theatres, Inc., in 1953 for $7,500.* The Colony was not built as a motion picture theatre. It was originally a grocery store which had been converted to a theatre (Defts' App. p. 677a). Consolidated had operated the Colony as a neighborhood second-run theatre. Prior to plaintiff's acquisition of the Colony, the theatre had never been operated as a first-run theatre except upon minor or secondary pictures (Defts' App. p. 678a).

The defendant Key Theatres operates only two theatres anywhere, one being the 1,275 seat State theatre in downtown Raleigh. The other is the Paramount theatre in High Point, North Carolina (Defts' App. p. 10a). Petitioner concedes that his theatre does not have even half the seating capacity of the State. (Petition, p. 21).

Consolidated took over operation of the 650 seat Village theatre in the Cameron Village Shopping Center about the time it disposed of its interest in the Colony. The Cameron Village Shopping Center is one of the largest in North Carolina—or any where else, for that matter—and is located a short distance from North Carolina State University (Defts' App. p. 643a). It is generally known that North Carolina State University in Raleigh has about 12,000 students in residence.

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*Consolidated Theatres, Inc., and Columbia Pictures Corporation were named as defendants but each settled with petitioner and each was dismissed prior to the decision of the District Court.

The defendant North Carolina Theatres operates only one first-run theatre in Raleigh, the 1,500 seat Ambassador on Fayetteville Street near the state Capitol building. That defendant also operates other theatres in North Carolina, including two subsequent run theatres in Raleigh (Defts' App. p. 807a).

From the day petitioner purchased the Colony in 1953 until he abandoned the theatre in December, 1960, he was afforded an opportunity to and did compete for first-run motion pictures in Raleigh. He was never at any time excluded from the market. There was never a day when the Colony was dark or closed for lack of a picture to show on its screen. Indeed, the petition itself demonstrates that the Colony was licensed many quality pictures even until the last days of petitioner's operation. That petitioner wanted more is of no consequence. No theatre—not even the Radio City Music Hall in New York—gets all the top box office attractions.

When the motions for summary judgment were made petitioner's immediate objection was that he had not had an opportunity for full pre-trial discovery. Defendants agreed that plaintiff was entitled on such a motion to all the discovery necessary, as provided by Rule 56(f) of the Federal Rules of Civil Procedure. The District Court allowed such discovery (Appendix to this brief pp. 9a, 14a). Petitioner then took the depositions of all of defendants' living and available employees and former employees—ten in number—and inspected all the documents he had requested, several thousand altogether. The court below had before it 595 pages of a typed appendix which plaintiff thought essential to his case and a 905 page printed appendix from defendants which, by and large, filled in the omissions made by plaintiff in order to give the court a fair picture of the nature and extent of the evidence produced.

The District Court, of course, had the full record. There is no complaint that petitioner needed more discovery or that any item of discovery was withheld from him or that either court was denied access to pertinent information. Petitioner could not have had more evidence after a full trial.

It would be of no help to this Court, we think, to attempt an extended analysis of petitioner's interpretations of his own affidavits or of his own ratings of the pictures which were not licensed to him, but which he claims should have been licensed to him. We note merely that all of petitioner's speculations, interpretations, conclusions and ratings were before the courts below and were considered by both. All were rejected as being of no probative value. We believe it helpful, however, to point out to this Court the extent and compass of the evidentiary material made available to petitioner and used by him in his arguments below. That is set out above. The only really exceptional aspect about this otherwise ordinary action is the unusual and extraordinary amounts of pre-trial discovery—both oral and written—afforded to petitioner by the District Court and made available to him by the defendants. Nothing was withheld from petitioner and he makes no claim that he needed further and additional discovery. The whole case that petitioner could possibly make was before the courts below.

ARGUMENT

PETITIONER HAS ADVANCED NO REASON WHY THE WRIT SHOULD ISSUE.

A. Petitioner Did Not Meet the Requirements of Rule 56 of the Federal Rules of Civil Procedure.

This Court in 1938, aided by a distinguished committee of scholars, promulgated the Federal Rules of Civil Procedure to govern trial and pre-trial procedures in the federal

courts. As experience in the courts has dictated, there have been from time to time amendments to the rules. One such rule is Rule 56. The most recent amendments, the ones with which we are here concerned, are those to Rules 56(c) and 56(e), which became effective on July 1, 1963.

In formulating and promulgating Rule 56 of the Federal Rules, including the amendments to the rule, there is no suggestion than this Court intended to or did carve out any exceptions to the rule in favor of one type of action over another. Certainly, there is no intimination in any of the Advisory Committee's Notes that Rule 56 was not to have application to actions under the anti-trust laws. Indeed, Rule 56 may, contrary to petitioner's views, have had its greatest value in anti-trust cases. Many worthless cases have been disposed of by summary judgment and others reduced to manageable size. It became fashionable in the 50's and 60's to think of certain anti-trust cases as "prolonged" cases, including cases which in fact have no merit and which not only should not be prolonged but which in fact should be disposed of or curtailed by a judicious application of Rule 56. This is one such case. There is no magic in resorting to Sections 1 and 2 of the Sherman Act to assert a non-meritorious claim.

We come, therefore, to the only question before this Court. Did the court below err in affirming a judgment for respondents under Rule 56? In pertinent part, Rule 56 provides:

> "(c) *Motion and Proceedings Thereon.**** The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

the moving party is entitled to a judgment as a matter of law.***

* * *

"(e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.*** When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Rule 56 was amended by this Court in 1963 for the express purpose of effectuating the salutary intent of the rule and to dispose of cases such as the case at bar without the necessity for a prolonged trial that could only result in a judgment for the moving parties, here the respondants. That Rule 56 was amended to take care of too rigid standards on motions for summary judgment and to enable the court to dispose of non-meritorious actions is plainly seen in the Advisory Committee's Notes. With respect to the last two sentences in Rule 56(e), which constituted the amendment of 1963, the Committee said, in part, as follows:

"The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.***

> "It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment."

The Advisory Committee's Notes were given effective force by the courts in *Markwell* v. *General Tire and Rubber Company,* 367 F. 2d 748, 750 (7th Cir. 1966), and *Scarboro* v. *Universal C. I. T. Credit Corporation,* 364 F. 2d 10, 15 (5th Cir. 1966). In each case a summary judgment was affirmed.

The express language of Rule 56(e) required plaintiff in the case at bar to go forward with affidavits or as otherwise provided in the rule. Plaintiff was required to set forth specific facts on his personal knowledge which would be admissible in evidence, showing that the defendants' affidavits were not true, that defendants' employees and former employees had testified falsely on depositions and that there was a genuine issue of fact to be tried. Plaintiff was unable to make such a showing, as the District Court held (Appendix to this brief, p. 31a):

> "Plaintiff has not offered any evidence of a common plan, scheme or design among the alleged conspirators. He has not offered any evidence which would allow him to prove conspiracy by similarity of conduct in that the record does not disclose evidence of a mutual awareness of action or conscious parallelism."

In no place in his brief does petitioner come to grips with the question before this Court. He barely mentions Rule 56 and the specific requirements of Rule 56(e). He has not referred this Court to one single case under Rule 56 which was decided after the effective date of the 1963 amendments. Petitioner has resorted, instead, to the citation of a line of anti-trust decisions which dealt with conspiratorial

action and other similar violations of the anti-trust laws. At no place in his brief or elsewhere has petitioner even claimed that the District Court's findings and conclusions were not supported by the evidence or that the court needed more evidence.

Rather than point to the respects in which the District Court erred, petitioner has resorted to a listing of unrelated anti-trust decisions and has advanced the contention that on the evidence before the court a jury might conceivably have found for petitioner by speculating that the distributor respondents must have had knowledge of the course of conduct of the other distributors with regard to their methods of licensing motion pictures for first-run in Raleigh. We can only say that it would be a most remarkable state of affairs if the managers of the distributors' offices in Charlotte did not know each other and if they had not known generally how pictures were being exhibited in a large city such as Raleigh. Indeed, the distributors subscribed to newspapers in the larger towns for the purpose of knowing which pictures were playing in which theatres (Defts' App. p. 209a). This undisputed fact does not raise petitioner's contention to the level of proof that the respondents had conspiratorial knowledge and had, therefore, conspired to injure petitioner.

There is no dispute that North Carolina Theatres and Consolidated Theatres each operated a number of theatres in towns other than Raleigh. There is not a suggestion in the record, however, that the fact that those exhibitors operated other theatres played any part in the licensing of pictures by them or by the State and Colony theatres. There is no suggestion that Consolidated's Village or North Carolina's Ambassador ever licensed more pictures than could be exhibited. There is no evidence that either defendant ever licensed a

picture for the purpose of keeping petitioner out of the market or that petitioner was ever excluded from the market. The schedules contained in defendants' appendix at pages 888a-901a show that the Village and Ambassador paid substantial film rentals for the pictures exhibited in those theatres. In his affidavit, Mr. Hugh Smart admitted that through error of judgment as to their public appeal he had offered and paid too much film rental on certain pictures (Defts' App. p. 15a). Generalities and unsupported allegations by petitioner will not do in the face of the record which he made in the District Court.

B. Summary Judgment Was the Appropriate Remedy in this Case.

Petitioner has evaded the burden upon him to meet the requirements of Rule 56 on defendants' motions. He has not come forward with specific facts based upon personal knowledge which would be admissable as evidence to defeat the motions. Petitioner's principal argument, seems to be that motions under Rule 56 are not appropriate in anti-trust cases. If that is his theory, petitioner could not be more mistaken.

In the court below, as among the other circuits, there have been many actions under the anti-trust laws which have been disposed of, in whole or in large part, by motions under Rule 56. One such case is *Bond Distributing Co.* v. *Carling Brewing Company,* 32 F. R. D. 409 (D. Md. 1963), *aff'd,* 325 F. 2d 158 (4th Cir. 1963). In that case defendants moved for summary judgment as to the anti-trust allegations contained in the complaint. In granting the motion the District Court said (p. 415):

> "Where there is no genuine issue as to any material fact, it is the duty of the Court to grant a motion for summary judgment in order to save the time and expense which would be required for the preparation

> and trial of the issues covered by the motion. Rule 56, F. R. Civ. P. As Chief Judge Sobeloff said in Zoby v. American Fidelity Company, 4 Cir., 242 F. 2d 76, 80, it is well settled 'that to resist a motion for summary judgment, the party against whom it is sought must present some evidence to indicate that the facts are in dispute, where the moving party's evidence has shown otherwise * * *. His bare contention that the issue is disputable will not suffice.' In the instant case plaintiffs have not been able to present any evidence to indicate that the facts with respect to Count 4 are in dispute, and the moving party's evidence has shown otherwise."

In affirming, the Court of Appeals in its *per curiam* opinion referred to the opinion of the District Court and said (325 F. 2d 158, 159):

> "We further conclude that, since the plaintiffs were unable to point to any evidence tending to support the allegations of Count 4, the Court did not err in determining that there was no genuine issue of any material fact with respect to such allegations and in granting defendant's motion for partial summary judgment."

Savon Gas Stations No. Six, Inc. v. *Shell Oil Company,* 203 F. Supp. 529 (D. Md. 1962), *aff'd,* 309 F. 2d 306 (4th Cir. 1962), is another case where the court below affirmed a judgment for a defendant in an action alleging violations of the anti-trust laws.

That summary judgment is the proper remedy in cases of this sort and other conspiracy cases is also seen in the decisions in *Norfolk and Western Ry. Co.* v. *Anderson's-Black-Rock, Inc.,* 350 F. 2d 917 (4th Cir. 1965), *MacLean*

v. *Parkwood, Inc.*, 354 F. 2d 770 (1st Cir. 1966), *Cowen* v. *New York Stock Exchange*, 371 F. 2d 661 (2nd Cir. 1967), *Gold Fuel Service, Inc.* v. *Esso Standard Oil Co.*, 306 F. 2d 61 (3rd Cir. 1962) cert den 371 U. S. 951, *Dressler* v. *MV Sandpiper*, 331 F. 2d 130 (2nd Cir. 1964), and *Scolnick* v. *Lefkowitz*, 329 F. 2d 716 (2nd Cir. 1964).

A case in point on the overall problem before this Court is *Lundeen* v. *Cordner*, 354 F. 2d 401 (8th Cir. 1966), motion to amend judgment denied, 356 F. 2d 169 (8th Cir. 1966). In that case the parties were concerned with the proceeds of a group insurance policy in which the appellant was the deceased's first wife and the appellee his second wife. Both sought the proceeds of the policy. The District Court entered summary judgment for the second wife (intervener) on the ground that the deceased had changed the beneficiaries of the policy and that no issue of fact existed. In affirming the judgment in favor of the second wife, the Court of Appeals reviewed the evidence and said (354 F. 2d at 407):

> "We are of the opinion that if this information were presented at trial, intervener would be entitled to a directed verdict in her favor, and it has been said that if the information presented entitles one to a directed verdict, a summary judgment is in order. Christianson v. Gaines, 85 U. S. App. D. C. 15, 174 F. 2d 534 (1949); 6 Moore's Federal Practice, § 56.11 [3] (2nd Ed. 1953) at page 2071. Intervener having made a sufficient showing, it then rests upon the plaintiff to specify at least some evidence which could be produced at trial. Belinsky v. Twentieth Restaurant, Inc., 207 F. Supp. 412 (S. D. N. Y. 1962). Plaintiff apparently is of the opinion that, since she makes a prima facie case by merely introducing the Certificate showing her children as

designated beneficiaries, she is entitled to a trial on the issue of (1) whether any change of beneficiary was made, and (2) if so, what changes were actually made. This we do not feel is a correct view of the law.

"The counter-affidavit of the plaintiff does not meet the issues raised and supported by the intervener. This leaves no genuine issue as to any material fact, and presents a predicate for a summary judgment under Rule 56(c), Fed. R. Civ. P."

The court also said (p. 408):

"Therefore, even though cross-examination is a trial right which must be carefully protected, in this case, unlike many others there is no obvious advantage to be gained from a cross-examination. If there were, a summary judgment might arguably be improper. But where there is no indication that the affiant was biased, dishonest, mistaken, unaware or unsure of the facts, the cases declaring that cross-examination is necessary when one of the above is present, have no application here. There being no positive showing that this witness's testimony could be impeached or that he might have additional testimony valuable to plaintiff, summary judgment was properly granted. The opposing party cannot as a matter of course force a trial merely in order to cross-examine such an affiant, nor must the Court deny the motion for summary judgment on the basis of a vague supposition that something might turn up at the trial. Schneider v. McKesson & Robbins, Inc., 254 F. 2d 827 (2 Cir. 1958); Port of Palm Beach District v. Goethals, 104 F. 2d 706 (5 Cir. 1939); 6 Moore's Federal Practice, § 56.15 [3] (2d Ed. 1953) at page 2129.

> "There is absolutely no showing that a trial would produce any different or additional evidence."

And further (p. 409):

> "Keeping in mind that the purpose of the summary judgment is to avoid useless trials, from the circumstances of this case we believe a trial would indeed be a useless waste of time and expense to the parties as well as a needless inconvenience to the Court."

On the motion to amend the judgment, the Court of Appeals in its *per curiam* opinion said (356 F. 2d at 170):

> "In the first place, contrary to the allegations of appellant, we have declared no new law in this area. We have applied the law well established by precedent and Rule 56(e), Fed. R. Civ. P. There is no doubt as to the law. To be entitled to a summary judgment, the moving party must "adequately support" his motion. A motion is "adequately supported" if it demonstrates that there are no genuine issues of fact. Sartor v. Arkansas Natural Gas Corp., 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967 (1944). In affirming the holding of the trial court, we went to great lengths to point out why we believed that the affidavits, the exhibits, and the inferences properly drawn therefrom were, indeed, sufficient to support a motion for summary judgment.
>
> "The law is equally clear that when a moving party presents an adequately supported motion for summary judgment (as was done herein) the adverse party must come forward with facts, not allegations, which controvert the necessary facts set forth in the moving party's case. Rule 56(e) clearly spells out this duty on the sanction of suffering a summary judgment."

C. In All the Discovery Proceedings Petitioner Was Not Able to Meet any of the Requirements Pre-Requisite to a Recovery on an Anti-trust Claim.

Petitioner purported to assert a claim under the anti-trust laws for injury to him in his business of operating the Colony theatre in Raleigh. Ever to succeed on such a claim it was necessary for petitioner to prove that respondents, acting in concert, combined and conspired to injure him in his operation of the Colony, that respondents' acts were the proximate cause of petitioner's alleged injury and that petitioner suffered damages in an ascertainable amount as a result of respondents' acts. To defeat the motions for summary judgment it was incumbent upon petitioner to prove the existence of these essential elements with facts which would be admissible in evidence as required by Rule 56. Petitioner was further required to show affirmatively that he was competent to testify to the matters in issue. Petitioner could not rest upon his theories, speculations and interpretations of the evidence or his conclusions with respect thereto.

The proceedings below were the equivalent of a full trial. There were seventeen affidavits, ten depositions and the production of many thousands of documents. Despite all the discovery afforded to petitioner he was wholly unable to make any showing that any one of these three elements was present. We consider each briefly.

(1) As to a Conspiracy.

Petitioner discovered no evidence whatever of any concert of action or combination among the respondents which had as its aim injury to him. Petitioner's speculations and conjectures that over an eight year period he made superior offers on competitive bidding for 153 pictures—about 20 a year—which were licensed to the other three larger first

run theatres in Raleigh are not supported by the record. The longer playing time and higher percentage terms offered by petitioner on pictures not licensed to him were meaningless in the light of Colony's actual performance on the hundreds of pictures which were licensed to it. The Village, State and Ambassador took in more money at the box office in less playing time (that is, fewer days) and paid higher film rentals than did the Colony. This is true regardless of the quality of pictures exhibited. In Defendants' Appendix in the court below at pages 902a-904a are tables which show the actual performance of the four theatres in Raleigh on Paramount, Metro and Twentieth Century-Fox pictures. The pictures are grouped by total area film receipts in the two Carolinas—the first group being those with total box office receipts of over $100,000, the second from $50 to $99,000 and so on.* In no one of the four groups did Colony exceed the average box office receipts or film rentals paid by the other three theatres. Indeed, petitioner concedes that Colony could not produce equal or superior film rentals to the Ambassador, State and Village theatres on an average daily basis, even on comparable pictures (Petition, p. 14).

Petitioner's conjectures as to superior bids do not raise a jury question because the facts upon which such conjectures are based do not give rise to an inference of conspiracy. The licensing of pictures in Raleigh was a matter of individual business judgment by each distributor.

Petitioner's evaluations of his bids, made in hindsight and in sole reliance upon the factors of longer playing time

*Area film rentals are the entire receipts from all theatres in North Carolina and South Carolina during the exhibition life of a picture. Petitioner himself in the District Court declared that area film rentals constituted the only proper basis of comparison (p. 17 of Petitioner's reply brief in the District Court).

and higher percentages to the complete exclusion of all other relevant factors is pure speculation and, as noted by the District Court, was not worthy of consideration by the court or a jury.

The incongruity of petitioner's position is seen, for example, in his argument that Metro's acceptance of petitioner's bid of longer playing time and higher percentage terms on the picture DON'T GO NEAR THE WATER is proof that Metro acted conspiratorily when it rejected petitioner's bid on other pictures (Petition, p. 39). If, in fact, there had been a conspiracy, why would Metro have licensed DON'T GO NEAR THE WATER to petitioner in the first place? Petitioner in fact was licensed and exhibited many pictures from 1953 to 1960, which he conceded to be of top quality at the box office, including THE TEN COMMANDMENTS, the top picture at the box office of all time in the Carolinas (Defts' App. p. 719a). Many of those pictures are set out in Defendants' Appendix at pages 889a-901a.

Petitioner does not claim that there was an intermittent, part time conspiracy which one day gave him top pictures but the next day excluded him from the market. The licensing of top pictures to the Colony demonstrates that the licensing of pictures was not the result of concert or of any act of conspiracy but the exercise of independent business judgment. The licensing of such top pictures to petitioner is wholly inconsistent with any theory of conspiracy based upon an evaluation of competing bids. The record is wholly barren of any evidence that there was a common plan or design among the respondents in dealing with the petitioner.

The only other suggestion made by petitioner that respondents violated the anti-trust laws is that two of the theatres involved—the State and Ambassador—did not customarily exhibit pictures distributed by the same distributor respondents. Assuming that petitioner is correct in his analysis of the play-offs at the two theatres, he has not pointed

to a shred of evidence from which it could be inferred that the State and Ambassador were able to or did divide the market or that, if there was an attempt to divide, such attempted division deprived him—and Village, too, for that matter—of an opportunity to compete for and obtain pictures or injured him in any other way. Petitioner was never deprived of pictures or of the opportunity to obtain pictures.

Petitioner in fact was awarded and exhibited more of the Paramount and Metro pictures for which he bid than Ambassador, exhibiting thirty-one Paramount pictures to Ambassador's twenty-four and twenty-eight Metro pictures to Ambassador's six (Defts' App. p. 881a).* The only evidence of an attempt to work out a division of pictures was petitioner's efforts at such an arrangement between his Colony and the Village and Ambassador (Defts' App. pp. 648a-49a). State seems not to have been involved in petitioner's efforts.

All these matters were fully considered by the two courts below. Petitioner's claims were rejected by both courts as being without substance.

(2) As to Proximate Cause

The second element necessary to sustain a judgment for injury to property in violation of the anti-trust laws is likewise missing. Since there was no conspiracy, there could have been no acts constituting the proximate cause of any injury to petitioner in his operation of the Colony. Economic factors having nothing whatever to do with the anti-trust violations alleged were the cause of petitioner's eventual lack of success. The Colony was an

*Petitioner was licensed and exhibited Metro, Paramount and Twentieth Century-Fox pictures on 894 of the 1096 days available during 1958, 1959 and 1960 (the maximum damage period—assuming damage). It was physically impossible for petitioner to have exhibited all the pictures he claims should have been licensed to him.

inferior theatre operated on a subsequent run in a small neighborhood shopping center when petitioner acquired it for $7,500 in 1953. If petitioner had some initial success with the theatre, that success rapidly vanished. By 1958 the full impact of television was being felt in Raleigh and Wake County, North Carolina. Fringe theatres, such as the Colony, could not survive that competition. In 1959 there were television sets in 34,400 of the 41,400 households in Raleigh and the rest of Wake County (Pltff's App. p. 595). There were certainly more in December, 1960. In the whole of the South the number of households with television sets increased from 53 per cent. in June, 1955, to 82 per cent. in May, 1960 (Statistical Abstract of the United States, 88th ed.). The total number of theatres in the United States (exclusive of drive-ins) decreased from 14,716 in 1954 to 12,291 in 1958 to 9,150 in 1963. In North Carolina the number of theatres (exclusive of drive-ins) decreased from 373 in 1954 to 346 in 1958 to 218 in 1963 (1954, 1958 and 1963 Census of Business, Selected Services, Motion Pictures, Bureau of the Census).

(3) As to the Fact and Amount of Damage

Evidence of the third element, the fact that petitioner actually suffered damage in an ascertainable amount, is also missing. There is not a word of testimony as to the fact or the amount of damage. There are no schedules showing that petitioner in fact was damaged in his operation of the Colony. There are no opinions, expert or otherwise and whether valid or worthless, as to petitioner's damage, if any, in his operation of the Colony. That petitioner may have had less success than he had hoped is not proof of damages. Nor is the fact that he may even have lost money proof of damages in the anti-trust sense.

When respondents made their motions for summary judgment, petitioner was bound to go forward to show the

existence, contrary to respondents' position, of the foregoing elements necessary to recover on an anti-trust claim. Petitioner failed to make that showing as to any one of the elements and he thus failed to raise any issue for submission to a jury.

A litigant's right to a jury trial, moreover, is by no means absolute. If there is nothing for the jury to decide, the court must direct a verdict at trial or enter summary judgment upon motion. As Circuit Judge Brown said in *United States* v. *Egbert*, 347 F. 2d 987 (5th Cir. 1965), "A useless trial is a luxury none can afford." (p. 988).

In *Manganaro* v. *Delaval Separator Co.*, 309 F. 2d 389 (1st Cir. 1962), the court, in affirming a summary judgment for defendant, said (p. 393):

> "In sum, while we believe that the plaintiff is entitled to all favorable inferences, he is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture. Such would be necessary were we to overturn the decision of the district court."

The rule on summary judgments and directed verdicts has been stated in many ways. In *Rozhon* v. *Triangle Publications*, 230 F. 2d 359 (7th Cir. 1956), the court said (p. 361):

> "Reviewing the propriety of a directed verdict at the close of a plaintiff's case, as here, it is necessary for us to examine the nature and quantum of the evidence offered and received below. For the right to a trial by jury is not a blanket guarantee that upon this plaintiff producing any potpourri of evidentiary fragments laced, with hints, he is automatically entitled to have his case sent to the triers of fact."

The foregoing principals of law were applied by the District Court in granting defendants' motions for summary judgment (Appendix to this brief, pp. 28a-29a):

> "If the evidence construed most favorably in behalf of the plaintiff would justify or require a directed verdict against him, the Court should enter summary judgment for the defendants. *Dulansky* v. *Iowa-Illinois Gas and Electric Co.*, 10 F. R. D. 566 (S. D. Iowa, 1950), *Dewey* v. *Clark*, 180 F. 2d 766 (D. C. Cir., 1950). A popular formula is that summary judgment should be granted on the same kind of showing as would permit direction of a verdict were the case to be tried. *Sartor* v. *Arkansas Natural Gas Corporation*, 321 U. S. 620, 64 S. Ct. 724 88 L. Ed. 967 (1944). The theory underlying a motion for summary judgment is substantially the same as that underlying a motion for a directed verdict. The essence of both motions is that there is no genuine issue of material fact to be resolved by the trier of facts. In accordance with the theory of a directed verdict, a court should not grant summary judgment where it could not properly direct a verdict although it might properly set aside a verdict as being against the weight of the evidence, and summary judgment should not be granted on the ground that if a verdict were rendered for the adverse party the court would set it aside."

The District Court was correct in its evaluation of the evidence in holding that plaintiff had "presented a very forceful case in his complaint, but he has been unable to support his allegations by evidentiary facts" to resist the motion for summary judgment (Appendix to this brief p. 31a). The complaint was properly dismissed.

CONCLUSION

For all the foregoing reasons it is respectfully submitted that the petition for certiorari should be denied. There is no issue in this case which warrants the attention of this Court. The petition presents no question of law which has not been but should be decided by this Court.

Respectfully submitted,

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January 25, 1968